

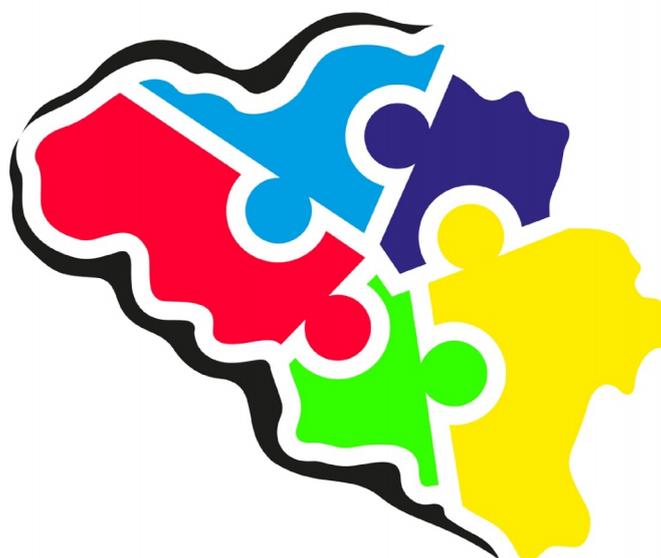
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# Regional participation in EU decision- making

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Role in the legislature and  
subsidiarity monitoring

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IN-DEPTH ANALYSIS

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The aim of this paper is to look from a legal perspective at the ways in which sub-national authorities participate in EU decision-making. Particular attention is paid to the access of regional ministers to the Council of the EU and to some of the innovations of the Lisbon Treaty regarding subsidiarity monitoring. The latter include the role of regional parliaments with legislative powers within the 'Early Warning Mechanism', and the right of the Committee of the Regions to bring an action for annulment.

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## EXECUTIVE SUMMARY

The traditional perspective of a 'Europe of states' has been challenged by the notion of a 'Europe of regions', calling for recognition of the governance level(s) below the state. Throughout recent decades, regions and other sub-national actors have been demanding more powers in the European Union, and their roles in decision-making have grown.

The EU Treaties open the doors for regional participation in several ways. Among the first and significant changes in terms of regional participation was the access of regional ministers to the Council. The EU Treaties in principle allow a Member State to be represented by a regional minister, yet leave it to the national level to determine the extent of, and arrangements for, such representation. As a result, different practices emerged across a handful of Member States, and the intensity of regional involvement through this channel varies significantly.

In terms of regional participation, significant changes, primarily with regard to subsidiarity, were introduced by the Treaty of Lisbon. The Treaty explicitly recognised the sub-national dimension of the subsidiarity principle, and incorporated references to regional parliaments in provisions dealing with subsidiarity monitoring (Early Warning Mechanism). However, it is up to the national parliaments to consult regional parliaments with legislative powers when considering draft legislative proposals, and no votes potentially triggering a 'yellow card' procedure are directly allocated to regional parliaments. Accordingly, the role of regional parliaments under the mechanism remains advisory and ultimately depends on national arrangements. Available studies suggest that regional parliaments face numerous challenges, including lack of staff and resources, in engaging in subsidiarity monitoring, or simply lack the incentives to conduct genuine subsidiarity checks. Regional engagement in this respect thus remains uneven, and the potential of regional parliaments to contribute to meaningful subsidiarity monitoring is questioned. Currently, there are 75 regional parliaments with legislative powers spread over eight Member States.

An ex-post action for annulment before the Court of Justice on subsidiarity grounds constitutes an important, albeit not uncontroversial, adjunct to subsidiarity monitoring ex ante. Importantly, the Treaty of Lisbon added the Committee of the Regions to the list of semi-privileged applicants under Article 263 TFEU, able to start an action for annulment to protect its own prerogatives. In addition, the Committee has been granted the right to start an action on subsidiarity grounds, for legislative acts subject to mandatory consultation of the Committee. As a result, the Committee has become one of the 'guardians' of the principle of subsidiarity.

While the Committee has not yet used its power to seek annulment of an EU act, it is generally accepted that the very prospect of an action enhances the Committee's participation rights ex ante, and increases the Committee's potential to effectively shape legislation. In addition, the current Better Regulation approach contains several references to the regional and local dimension of Union policies, and puts increased emphasis on subsidiarity. Therefore, it is not necessarily the number of proposals blocked or acts annulled which serve as an indication of the success of 'early warning' or judicial review. Instead, the very fact of scrutiny by various actors at different levels invites the EU institutions to think carefully about the appropriate level of governance, and to justify more thoroughly whether an issue needs to be tackled at the European, national, regional or even local level.

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## 1. Introduction: what role for the regions?

### 1.1. 'Europe of states' or 'Europe of regions'?

The European Union is a '**Union of states**', which remains the main political and legal paradigm of European integration. This view is confirmed by, for example, Article 52 TEU, which sets out the territorial scope of the Union and lists its Member States. States are commonly referred as the 'Masters of the Treaties', as evidenced by Article 48 TEU, which sets out the treaty-revision procedures.

However, a number of developments in the 1980s and 1990s led to looking at governance level(s) *below* the state, including at regional and local levels. Several factors contributed to this development, including the development of the Community's regional policy, the creation of the Committee of the Regions in 1994 and decentralisation processes in a number of Member States. This has caused regional actors to demand increased participation rights at EU level, partially with significant success. These and other developments have led to the emergence of the notion of a '**Europe of the regions**', aimed at challenging the orthodox notion of a 'Europe of states', and calling for greater recognition of the regional dimension of the Union.<sup>1</sup>

These developments were accompanied by the emergence of different variants of '**multi-level-governance**' approaches in the literature, depicting European governance as a system in which authority is shared among different territorial tiers, including the supranational, national, regional and local.<sup>2</sup> Much of this literature, primarily in the political science field, has focused on the question of whether, and how far, sub-national actors are capable of 'by-passing' their national counterparts by acting independently in the European arena. A boost for multi-level governance in Europe came with the influential **White Paper on European Governance** (2001), which emphasised the importance of engaging all levels of government – global, European, national, regional and local – for better governance efforts to succeed. It called for, inter alia, stronger involvement of and interaction with regional and local actors, and stressed the need to reach out to citizens through regional and local democracy. Multi-governance principles are now incorporated in several documents, including, for example, the 2014 Committee of the Regions' Charter for Multilevel Governance in Europe.<sup>3</sup> The so-called Common Provisions Regulation (CPR) on European Structural and Investment Funds sets out multi-level governance as a 'principle' to govern partnership agreements with sub-national authorities in the implementation of EU cohesion policy.<sup>4</sup> Many of the ideas contained in the White Paper on European Governance are echoed in the current Commission approach to Better Regulation,<sup>5</sup> which signals renewed commitment to subsidiarity, effectiveness, transparency,

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<sup>1</sup> Elias, A. (2008), 'Introduction: Whatever Happened to the Europe of the Regions? Revisiting the Regional Dimension of European Politics', in: *Regional and Federal Studies*, 18(5), pp. 483-492.

<sup>2</sup> In particular Hooghe, L. and Marks, G. (2001), *Multi-Level Governance and European Integration* (Rowman Littlefield Publishers).

<sup>3</sup> Adopted in the form of a Resolution of the Committee of the Regions at its 106th plenary session on 2 and 3 April 2014, [RESOL-V-012](#).

<sup>4</sup> [Regulation No 1303/2013](#), OJ L 347/320, Article 5.

<sup>5</sup> European Commission, [Better Regulation package](#), 19 May 2016.

stakeholder participation and increased attention to implementation and enforcement issues, including explicit references to the regional and local levels.

Recent decades have seen intense **debate** regarding the role of the regions and other sub-national actors in the EU. Opinions diverge when it comes to the question of what the role of the regions and other sub-national bodies is and *should be* in the EU.<sup>6</sup> While there is recognition of the continuing need for increased involvement of regional and local bodies in EU affairs, in order to, inter alia, foster democratic legitimacy, critics note that taking (full) account of the sub-national dimension of the Union carries the risk of slowing down the EU decision-making processes, may compromise the Union's problem-solving capacity, adds to complexity and opacity of its institutional architecture and implies potential inequalities between compound and non-compound states. This, in turn, may undermine its legitimacy rather than fostering it.<sup>7</sup> Greater recognition of the regional dimension is further complicated by the fact that, given the different patterns of internal organisation of Member States, the sub-national level in Europe is highly heterogeneous, leading to different perceptions across the EU of what a 'region' actually is.

Due to these and other considerations, the EU has not turned into a 'Europe of regions', as hoped or predicted by some.<sup>8</sup> Nonetheless, the importance and institutional role of regional and local bodies have grown. There are numerous channels for the sub-national actors to become involved in EU decision-making, through both the national and European route, via the Committee of the Regions and/or individually. At European level, these include involvement in the activities of the Committee, regions' representative offices in Brussels, cooperation with the respective national governments, formal and informal cooperation channels with the European Commission and Parliament, and many others. This paper does not aim to discuss all these channels in depth or provide an exhaustive list of the ways regional actors can and do become involved in European affairs. It also does not comment from a normative perspective on whether there should be *more* such involvement. Instead, it discusses from a legal perspective the most significant examples of formal participation of sub-national actors as provided for in the EU Treaties, focusing in particular on the legal and institutional changes introduced with the Treaty of Lisbon. It thus focuses on (1) the **access of regional ministers to the Council**, (2) the role of regional parliaments with legislative powers in **subsidiarity monitoring** (Early Warning Mechanism), and (3) the right of the Committee of the Regions to **challenge the legality of a Union act** before the Court of Justice of the European Union (CJEU). The (perceived) challenges to and the limits of such participation are also addressed.

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<sup>6</sup> Speech of Prof. G. Abels on '[Regional Parliaments in Multi-Level Governance – Challenges and Perspectives in the Post-Lisbon Era](#)', given in a conference on *Strengthening Regional Parliaments in EU Affairs: Challenges, Practices and Perspectives*, 2-7-2014, Committee of the Regions, Brussels. This point also becomes clear from the debates which took place in the European Convention, for example [CONV 548/03](#), Summary report on the plenary session, 6 and 7 February 2003, pp. 7 et seq.

<sup>7</sup> These conflicting views are presented in, for example, Weatherill, S., (2005a) 'The Challenge of the Regional Dimension in the European Union', and (2005b) 'Finding a Role for the Regions in Checking the EU's Competence', in: Weatherill, S. and Bernitz, U. (eds.), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing), pp. 1-31 and pp. 131-155, respectively.

<sup>8</sup> Keating, M. (2008), 'A Quarter Century of the Europe of the Regions', in: *Regional and Federal Studies*, 18(5), pp. 629-635.

## 1.2. The sub-national dimension in the EU Treaties

The EU Treaties make several explicit references to the sub-national (regional or local) dimension of the EU. The most fundamental principle regarding the relationship between the Union and its 'third level' is laid down in Article 4(2) TEU, according to which the Union must respect the equality of Member States before the Treaties as well as their **national identities**, which are '*inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.*' The Union must also respect Member States' functions with regard to, inter alia, ensuring their territorial integrity. The same principle is embraced in the preamble of the EU Charter of Fundamental Rights, which calls upon the Union to respect the way Member States organise their public authorities at national, regional and local levels. This implies, for example, that the Union must respect the federal structure of Germany as well as the predominantly centralised system in France, which are to be treated equally.

A reference to regional and cultural diversity is found in Article 167(1) TFEU, dealing with culture, which provides that 'the Union shall contribute to the flowering of the cultures of the Member States, while respecting their **national and regional diversity** and at the same time bringing the common cultural heritage to the fore.'

With regard to provisions regarding the composition of EU institutions, Article 16 TEU concerning the **Council** should be mentioned. A long-standing approach to the composition of the Council is that it consisted of representatives of national governments. However the current version of Article 16(2) TEU, dealing with the composition of the Council, refers to a 'representative of each Member State at ministerial level able to commit the government of that Member State and cast its vote'. This in principle opens the doors for access of regional ministers to the Council, which is discussed in Section 2, below.

The sub-national dimension of the EU is especially prominent in provisions concerning **subsidiarity**, which have been amended, most recently with the Lisbon Treaty, to incorporate an explicit reference to the regional and local level. The Treaties express the aspiration that decisions should be taken 'as closely as possible to the citizen', and the principle of subsidiarity enshrined in Article 5(3) TEU explicitly acknowledges the possibility that some decisions may well be best taken at the regional or local level. The corresponding Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality makes detailed provisions concerning subsidiarity monitoring, and establishes what has become known as the 'Early Warning Mechanism' (also referred to as the 'Early Warning System'). The latter, although primarily concerned with national parliaments, envisages a role for regional parliaments with legislative powers. This role, as well as challenges in fulfilling it, is the focus of Section 3.

The Early Warning Mechanism of ex-ante subsidiarity monitoring is complemented by the possibility of **judicial review** in an action for annulment before the Court of Justice of the European Union. Importantly, the Lisbon Treaty granted the Committee of the Regions the right to start such an action in order to protect its own prerogatives and to seek legal review of an act for its alleged non-compliance with the principle of subsidiarity. This is discussed in Section 4.

Section 5 touches upon the sub-national dimension of the Better Regulation package, presented by the Commission in May 2015.

## 2. Regional access to the Council of the EU

### 2.1. Development of Treaty provisions

In multi-level-governance literature, the access of regional ministers to the Council of the EU has traditionally been one of the most prominent examples of formal and direct regional participation in EU decision-making. The possibility of such access was introduced with the Treaty of Maastricht. The former Article 146 of the EEC Treaty provided that the Council consisted of representatives of Member States; each government was to delegate one of its members. A long-standing approach to this provision was that such a representative had to be a member of the national government, '*whatever the internal distribution of power*' within the Member State in question between the national and the regional or local government.<sup>9</sup> According to the Council's Rules of Procedure, it was possible for a member of the Council – if prevented from attending the Council meeting – to arrange to be replaced.<sup>10</sup> While such a replacement could, in principle, be a regional minister, it was *not* possible for the latter to cast a vote if a vote was taken.<sup>11</sup>

Article 116 EC, inserted with the Maastricht Treaty, omitted the reference to the governments of the Member States, being changed to 'representative of each Member State at ministerial level, authorized to commit the government of that Member State'. This change was made in response to requests by, *inter alia*, Germany and Belgium.<sup>12</sup> The current Article 16(2) TEU adds that the respective representative must be able not only to commit the government of the Member State, but also to cast its vote. According to Annex I to the Council's Rules of Procedure, 'it is for each Member State to determine the way in which it is represented in the Council, in accordance with Article 16(2) TEU'.<sup>13</sup> This in principle opens the doors to representation by regional ministers in the Council, and has been used to different degrees by different Member States, as shown in the overview in Table 1.

### 2.2. Practice

As the EU Treaties do not regulate the practical arrangements of regional involvement in the Council, different practices have evolved across countries.<sup>14</sup> As a result, both the extent of, and the formal arrangements for, access of regional ministers to the Council differ significantly. In practice, a limited number of regions have made use of this provision and/or have made arrangements in this regard. They include, for example, the German and Austrian *Länder*, the regions and communities of Belgium, Spanish autonomous communities and the UK devolved administrations. Belgian regions were reported to have secured the most extensive participation rights in the Council,

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<sup>9</sup> [Written Question No 129/90 by Marc Galle to the Council of the European Communities](#), OJ C 125/53, 8 February 1990. (Emphasis added.)

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*; According to the former Council Rules of Procedure, the delegation of the right to vote could only be made to another member of the Council.

<sup>12</sup> Eggermont, F. (2011), 'In the Name of Democracy: The External Representation of the Regions in the Council', in: Panara, C., De Becker, A. (2011), *The Role of the Regions in EU Governance* (Springer), p. 6 (and sources referred to therein).

<sup>13</sup> Council Decision of 1 December 2009 adopting the Council's Rules of Procedure ([2009/937/EU](#)).

<sup>14</sup> Högenauer, A. (2015), 'The Limits of Territorial Interest Representation in the European Union', in: *Territory, Politics, Governance*, 3(2), p. 154.

followed by the German *Länder*. Due to the elaborate national arrangements of federal-regional cooperation in this regard, Germany has been reported to have 'developed a version of co-operative federalism for European policy formulation that takes internal competences into account.'<sup>15</sup>

It should also be noted that representation by regional ministers in the Council as provided for by Article 16(2) TEU is complemented by mechanisms of 'internal cooperation' between the central and the sub-national authorities, which enable common positions to be agreed in preparation for Council meetings.<sup>16</sup> These also vary significantly across states. A (non-exhaustive) overview of arrangements of such internal cooperation and representation in the Council in different countries is presented in Table 1 below.

**Table 1 – Participation of regional ministers in the Council**

Member State	Internal cooperation	Representation in Council meetings
	<i>(internal coordination of the respective central and regional positions prior to a Council meeting with the aim of achieving a common position to be defended either by the central or regional representative)</i>	
Austria	When the <i>Länder</i> reach a common position in a matter falling within their responsibility, the federal government is bound to uphold this stance in the Council. Departure from this position is only possible for compelling reasons of European integration and foreign policy.	If a matter belongs to the competence of the <i>Länder</i> or is of interest to them the federal government <i>may</i> allow a regional minister to represent Austria in the Council. The regional minister will have to collaborate with the representative of the federation (and will also be bound to represent the common position of the <i>Länder</i> ). The minister represents the entire Member State and not their particular <i>Land</i> .
Belgium	All Councils on matters falling within the responsibility of the Belgian Regions or Communities are preceded by a coordination meeting between the national government and the sub-national governments. The common position agreed is binding and must be defended by the representative in the Council. If no common position is achieved, it is mainly understood that the Belgian representative will have to abstain from voting.	Three possible forms of representation: (1) Representation by the national government for exclusive federal responsibilities, (2) exclusive representation by Communities or Regions for those areas exclusively within their responsibility; (3) a mixed representation for 'shared' responsibilities. Here, the head of the Belgian delegation may be a federal or regional minister.
Germany	When an EU proposal focuses on a matter falling within the legislative competence of the <i>Länder</i> , the federal government must pay the 'greatest	Representation by a regional minister when a draft EU act concerns the exclusive competences of the <i>Länder</i> in the areas of education, culture or

<sup>15</sup> A. Högenauer (2008), 'The Impact of the Lisbon Reform Treaty on Regional Engagement in EU Policy Making - Continuity or Change?', in: *European Journal of Law Reform*, 10(4), p. 544.

<sup>16</sup> Coordination of national positions concerns not only ministerial meetings but also meetings of Council working parties and Coreper. The Council's Rules of Procedure do not determine who attends working party meetings (although provide for limiting the size of national delegations), thus each Member State decides on its own delegation for a given meeting.

Member State	Internal cooperation	Representation in Council meetings
	possible respect' to the <i>Bundesrat's</i> position. Departure from such position is possible, for example, for compelling reasons of foreign policy or European integration.	radio/TV. The right to represent Germany belongs to a representative of the <i>Länder</i> designated by the <i>Bundesrat</i> (the respective representative represents the federation and not a single <i>Land</i> ). Such representative must act 'with the participation of and in coordination with' the federal government.
Italy	When issues relating to regional or local interests are on the agenda, regional and local delegates can participate in the meetings of the Interdepartmental Committee for European Affairs, discussing EU-related issues and preparing common positions of the Italian government. The Italian Regions may also request the submission to the State-Regions Conference of any proposal touching upon matters within their responsibility but, if no agreement is reached within the Conference, the government is free to depart from the position of the regions.	In theory, Italy offers a significant possibility for representatives of the Regions to be included in the external representation in the Council by participating in the Italian delegation. In matters of exclusive legislative competence of the regions, a regional representative may also be appointed as head of delegation. In fact, such participation of regional ministers is limited to consultation by national government.
Spain	The Autonomous Communities have the right to express common positions in matters falling within their competence. In an area of exclusive autonomic competence, the common position of the Autonomous Communities will be 'taken into account in a decisive way'. In areas of non-exclusive autonomic competence, the Autonomous Communities have to reach a common position which then needs to be agreed with the national government. In both scenarios, the government will normally defend the agreed position but it may exceptionally depart from it if necessary in Spain's best interest.	A representative of the Autonomous Communities is admitted to the Spanish delegation for matters of regional interest (allowed to participate in five Council configurations, including, for example, employment, social policy, health and consumer affairs, agriculture and fisheries, environment). The regional representative may be authorised to speak during Council meetings but is not entitled to vote on behalf of Spain.
UK	The UK government is required to consult the devolved administrations when EU proposals have an impact on their responsibilities. The position of the devolved administrations is not legally binding on the national government.	Decisions regarding ministerial attendance at Council meetings are taken on a case-by-case basis by the competent UK minister. The regional minister may be allowed to act as the UK spokesperson in the Council. When a regional minister represents the UK, a common position needs to be agreed with the UK government.
Finland	The Åland Islands are full participants in the preparation of Council meetings due to their special status. If the government of Åland and the	The Åland government may request to participate in the work of the Finnish delegation to the Council when the issue on the agenda falls within the

Member State	Internal cooperation	Representation in Council meetings
	government of Finland are not able to agree on a common position, the government of Åland can ask the Finnish government to declare the position of Åland in the Council.	competence of Åland and to become part of the delegation. If no agreement on a common position was reached, the Finnish representative has to declare Åland's position upon request but has no duty to uphold this position.
Portugal	The two autonomous regions (Azores and Madeira) are involved in the preparation of Council meetings and have to be consulted by the national government if matters of regional interest are on the agenda. There is no obligation to uphold their position in the Council.	Azores and Madeira have the right to participate in the Portuguese delegation when matters that concern them are on the agenda. There is no obligation for the Portuguese delegation to uphold the regional position in the Council.

Source: Panara, C. (2015).<sup>17</sup>

### 2.3. Assessment

In academic commentary, the actual impact of (what is now) Article 16(2) TEU in terms of regional participation has been debated. On the one hand, some have considered the access of regional ministers to the Council as a potential 'breakthrough' in regional participation in the EU,<sup>18</sup> at least signalling that central governments are not the only relevant decision-makers.<sup>19</sup> From a political perspective, this was considered significant especially given the fact that the Council has traditionally been viewed as the embodiment of pure 'intergovernmentalism' in the EU.<sup>20</sup> On the other hand, scholars have equally stressed the limits of such regional representation. The use of this provision has been shown to be rather limited as the arrangements in question primarily concern federal-type states (or states whose regions enjoy a lesser or greater degree of autonomy), and ultimately depend on agreement of the national government, even in the case of strong regions.<sup>21</sup> Central state representatives have been reported to exercise 'substantial constraints' on the autonomy of regional ministers, leading to the argument that Member States act as 'gate-keepers' of such participation in the Council.<sup>22</sup> Moreover, the position to be represented by regional ministers in the Council remains the national one and not the regional.<sup>23</sup>

When it comes to forging common positions to be represented in the Council (internal representation), arrangements vary. A common position of the regions can be binding upon the central government, possibly with some exceptions (e.g. Austria) or the latter needs to take utmost account of it (e.g. Spain). These propositions are well illustrated

<sup>17</sup> This is a shortened version of the table which is presented in Panara, C. (2015), *The Sub-national Dimension of the EU. A Legal Study of Multilevel Governance* (Springer), pp. 17-22. The table includes only states whose sub-national authorities have legislative powers.

<sup>18</sup> As noted in, for example, Hooghe, L. and Marks, G. (2001), *Multi-Level Governance and European Integration* (Rowman & Littlefield Publishers), p. 83.

<sup>19</sup> Tatham, M. (2008), 'Going Solo: Direct Regional Representation in the European Union', in: *Regional and Federal Studies*, 18(5), p. 511; See also Panara, C. (2015), p. 16.

<sup>20</sup> Tatham, M. (2008), p. 511.

<sup>21</sup> Greenwood, J. (2011), 'Actors of the Common Interest? The Brussels Offices of the Regions', in: *Journal of European Integration*, 33(4), p. 438.

<sup>22</sup> Tatham, M. (2008), p. 499 and references therein.

<sup>23</sup> Högenauer, A. (2008); Tatham, M. (2008), p. 499.

by the examples in Table 1 above. Many scholars have acknowledged the possibility of regional ministers' access as an important innovation of the Maastricht Treaty, while some suggested going even (much) further by at least exploring the options of, for example, splitting the total number of votes allocated to a state in the Council when a matter falls within regional competence.<sup>24</sup> This suggestion has remained a minority view largely unaddressed amidst (justified) concerns concerning, *inter alia*, the Council's decision-making ability.

Besides opening the doors of the Council to regional ministers, the Maastricht Treaty was considered significant due to yet another legal and political innovation: the introduction of the principle of **subsidiarity**. Aimed at alleviating the disputes regarding the division of competences between the (then) European Community and the national level,<sup>25</sup> the principle was incorporated at the request of, mainly, federal states with strong regions (e.g. Germany, Belgium), concerned about the alleged 'competence creep' and the 'centralist' tendencies of the Union.<sup>26</sup> The later Lisbon Treaty explicitly acknowledged the *sub-national dimension* of the subsidiarity principle and, importantly, developed mechanisms for ex-ante and ex-post monitoring of compliance with the principle, discussed in the sections below.

### 3. Subsidiarity, 'Early Warning' and regional parliaments

The principle of subsidiarity reflects the aspiration that decisions should be taken 'as closely as possible to the citizen'<sup>27</sup> and, in essence, concerns the question of the appropriate level (European, national, regional or local) of action. Unlike the principle of conferral, which concerns the *existence* of Union competence, the subsidiarity principle concerns the question of whether this competence should be exercised. The principle entails that, 'in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, *either at central or at regional and local level*, but can, rather, by reason of the scale or effects of the proposed action, be *better* achieved at Union level'. Only a few areas of Union action (e.g. customs union, common commercial policy and monetary policy in the euro area) fall within the category of exclusive competence, in which only the Union can adopt legally binding acts.<sup>28</sup> This implies that most proposals will have to satisfy the subsidiarity test. While the principle of subsidiarity was introduced in the Maastricht Treaty, the explicit reference to the principle's sub-national dimension followed in the Treaty of Lisbon. The current wording of Article 5(3) TEU reflects the recognition that subsidiarity does not merely

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<sup>24</sup> Weatherill notes that this idea was raised against the background of the negotiations leading to the Constitutional Treaty, which was never ratified: Weatherill, S. (2005), 'The Challenge of the Regional Dimension in the European Union', in: Weatherill, S. and Bernitz, U. (eds.), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing), p. 31.

<sup>25</sup> Craig P. (2012), 'Subsidiarity: A Political and Legal Analysis', in: *Journal of Common Market Studies*, 50(S1), p. 72.

<sup>26</sup> Van Nuffel, P. (2011), 'The Protection of Member States' Regions through the Subsidiarity Principle', in: Panara, C (2011), *The Role of the Regions in EU Governance* (Springer), pp. 55-80. A more comprehensive set of rationales for the introduction of the principle of subsidiarity in the Treaties is discussed in Craig P. (2012), pp. 72-73.

<sup>27</sup> Preamble, Articles 1 and 10(3) TEU.

<sup>28</sup> Articles 2(1) and 3(1) TFEU.

concern the relationship between the Union and the states' national level but that some competences may indeed be better exercised at regional or local level.<sup>29</sup>

### 3.1. Watching over subsidiarity: the legal framework

#### 3.1.1. Protocol on the Application of the Principles of Subsidiarity and Proportionality

Detailed arrangements regarding monitoring compliance with the principles of subsidiarity and proportionality are laid down in the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality (hereafter referred to as the 'subsidiarity protocol' or 'protocol'). The protocol establishes what has become known as the **Early Warning Mechanism (EWM)**, which gives national parliaments a central role in watching over compliance with the principle by granting them a right to signal at an early stage their concerns regarding a legislative proposal's compliance with the principle, and to force the Commission to review it under certain conditions. It should be noted that while the protocol's primary focus are the national parliaments, regional parliaments also play a role.

The protocol first of all mandates the Commission to **consult widely** before proposing legislative acts,<sup>30</sup> and to 'take into account the regional and local dimension' of the envisaged action in such consultations (Article 2).<sup>31</sup> Draft legislative acts are to be forwarded to national parliaments at the same time as to the Union legislator (Article 4). Such draft legislative acts have to be justified with regard to the principles of subsidiarity and proportionality, and must 'contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its *implications for the rules to be put in place by Member States, including, where necessary, the regional legislation*' (Article 5). The initiator of the proposal should substantiate the proposal's compliance with qualitative and, wherever possible, quantitative indicators. Further, draft legislative acts have to take account of the 'need for any burden, whether financial or administrative, falling upon the Union, national governments, *regional or local authorities*, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.'

In the EWM, each national parliament has **two votes** (in bicameral systems each of the two chambers has one vote, Article 7), which may be used in the form of a **reasoned opinion**. Such opinions are to be issued within eight weeks from the date of transmission of the proposal and need to set out the reasons why the national parliament (or chamber thereof) considers the proposal not in compliance with the principle. In this context, it is for each national Parliament or chamber thereof to 'consult, where appropriate, **regional parliaments with legislative powers**' (Article 6).

In a Union of 28 Member States, the total number of votes available is 56. If the reasoned opinions issued represent at least a third<sup>32</sup> of the total number of votes allocated to the national parliaments, the proposal must be reviewed ('**yellow card**'). The Commission (or the party which has put forward the proposal) remains free to *maintain, amend or withdraw* the proposal but needs to give reasons for its decision

<sup>29</sup> Kiiver, P. (2012), *The Early Warning System for the Principle of Subsidiarity. Constitutional Theory and Empirical Reality* (Routledge), p. 41.

<sup>30</sup> The duty of the Commission to consult broadly is also laid down in Article 11(3) TEU.

<sup>31</sup> No such consultations are mandatory in cases of exceptional urgency.

<sup>32</sup> The threshold is one quarter for acts in the Area of Freedom, Security and Justice.

(Article 7(2)). Where, in the context of the ordinary legislative procedure, reasoned opinions represent a simple majority of the votes allocated to national parliaments, and the Commission decides to *maintain* the proposal, the matter is referred to the Union legislator ('**orange card**'). The latter may, with a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, override the Commission's decision if it considers the proposal not compatible with the principle. In such a case, the proposal shall not be given further consideration. Therefore, here, it is not the national parliaments but the Union legislator which can effectively veto a proposal.

The subsidiarity protocol does not provide for a '**red card**' procedure, enabling the national parliaments to effectively *veto* a proposal, which was among the criticisms of the EWS from those seeking stronger rights for the national parliaments. The possibility of such a red card was discussed against the background of the UK's 'new settlement' in the European Union.<sup>33</sup> The 'new settlement' endorsed in February 2016<sup>34</sup> now provides that where reasoned opinions of national parliaments sent within 12 weeks of the transmission of a draft act represent more than 55% of the votes allocated to national parliaments, the 'representatives of the Member States acting in their capacity as members of the Council will discontinue the consideration of the draft legislative act in question unless the draft is amended to accommodate the concerns expressed'.<sup>35</sup> Therefore, this 'red card' is, ultimately, in the hands of the Council.

It should be noted that the protocol covers draft legislative acts only (Article 3). Non-legislative acts, including delegated and implementing acts, are excluded from its application. Moreover, while the protocol covers the principles of subsidiarity and proportionality, reasoned opinions of the national parliaments may concern subsidiarity only.

The system of political control over subsidiarity by means of the EWS is given '**legal teeth**' by explicitly opening the possibility to challenge legislative acts before the Court of Justice of the EU for (alleged) non-compliance with the principle (Article 8). In this regard, the Committee of the Regions is granted the right to bring such an action, if it concerns a legislative act on which the Committee has to be consulted. This is further discussed in Section 4, below.

In addition, such an action may also be notified to the Court by Member States, in accordance with their legal order, on behalf of the national parliaments or their chambers (Article 8). This grants another important right to national parliaments, although the extent and arrangements for exercising it is left to be determined by the national legal order.

### 3.1.2. *The regional dimension*

The primary rationale for developing the EWS was to foster legitimacy through **parliamentary involvement** in EU decision-making rather than enhancing regional participation.<sup>36</sup> Therefore, it is the *national* parliaments that have been at the centre of post-Lisbon scholarly attention concerned with EU decision-making, regional

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<sup>33</sup> It was among the demands set out in a [letter](#) by David Cameron to Donald Tusk on 10 November 2015.

<sup>34</sup> On the new settlement for the UK see Poptcheva, E. & Eatock, D., [The UK's 'new settlement' in the European Union. Renegotiation and referendum](#), EPRS, February 2016.

<sup>35</sup> Conclusions of the European Council meeting (18 and 19 February), Annex I, Section C par. 3.

<sup>36</sup> Panara, C. (2015), p. 115.

parliaments being largely at the margins of this debate. However, the insertion of an explicit reference to the regional and local level in Article 5(3) TEU would be empty of content if some recognition of sub-national parliaments was not also granted to such parliaments within the EWM. In fact, the subsidiarity protocol opens the doors for regional participation in at least two ways.

First, the mentioned Article 6 provides that, when issuing reasoned opinions, 'it will be for each national Parliament' or chamber of it to 'consult, where appropriate, *regional parliaments with legislative powers*'. This provision, albeit significant, already conveys that regional participation as foreseen in the protocol is subject to limitations. Generally, the levels of centralisation vary substantially among Member States with strong regions with legislative powers (e.g. Germany or Belgium) to centralised states with regions with hardly any significant role. Eight out of 28 Member States (Austria, Belgium, Finland, Germany, Italy, Portugal, Spain, UK) have been reported to have regions with legislative powers, and there are 75 such parliaments in total.<sup>37</sup> Not only regions in federal states (Austria, Germany, Belgium) may have legislative powers yet also regions in states which are not formally federal (e.g. the example of Åland Islands in Finland<sup>38</sup> or 'Autonomous Communities' in Spain).

Further, contrary to what was demanded by some in the drafting of the Constitutional Treaty,<sup>39</sup> the current arrangements **do not directly allocate votes** to the regional parliaments themselves – such votes are allocated to national parliaments only. It is the latter which decide whether or not to consult regional parliaments. Moreover, if they choose to do so, there is nothing in the protocol to suggest that the results of such consultations are *binding* upon national parliaments. Therefore, the function of regional parliaments is merely **advisory** in this context and their positions regarding subsidiarity will not count as votes for the purposes of triggering the yellow/orange card procedure.

Second, besides providing for (possible) consultation of regional parliaments, the protocol is clear that concerns regarding subsidiarity may be voiced by national parliaments or *chambers thereof*. The latter can, as the case may be, include a chamber representing regions such as the German and Austrian *Bundesräte*. In bicameral systems, each chamber has one vote in the Early Warning Mechanism; such is the case in, for example, Germany and Austria.

Generally, albeit subject to limitations mentioned above, the new recognition given to regional parliaments in the EWM has nevertheless been considered as having significant potential in terms of regional participation. This makes it worth taking a closer look at how it has functioned in practice so far and point to the opportunities as well as obstacles to such participation.

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<sup>37</sup> [CoR report](#) on the Subsidiarity Early Warning System of the Lisbon Treaty – the Role of Regional Parliaments with legislative Powers and Other Subnational Authorities, prepared by the Leuven Centre for Global Governance Studies, November 2013, p. 9.

<sup>38</sup> N. Jääskinen, 'The Case of the Åland Islands - Regional Autonomy versus the European Union of States', in: S. Weatherill and U. Bernitz (eds.), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing 2005), p. 89-101.

<sup>39</sup> These demands have been summarised in, for example, Weatherill, S. (2005), 'Finding a Role for the Regions in Checking the EU's Competence', in: Weatherill, S. and Bernitz, U. (eds.), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing).

### 3.2. The limits of regional participation in early warning: experiences, practices and challenges

The Early Warning Mechanism has now been in place for more than six years, and has given rise to a vast body of literature investigating the role of national parliaments in the EU legal system. Some note that the role of *regional* parliaments has largely been neglected in this debate.<sup>40</sup> A comprehensive study, which allows the drawing of some lessons from the experience so far, was commissioned by the Committee of the Regions (CoR) in 2013.<sup>41</sup> The study investigated in depth the issue of whether, and how far, regional parliaments have made use of the EWM, and reported **mixed results**. It suggests that, in general, the parliaments concerned (75 in total, in eight Member States) *have responded* to the new developments and have become increasingly involved in subsidiarity monitoring. These parliaments have established specific procedures to this effect and/or are 'in the process of modifying their internal Rules of Procedure to this end'.<sup>42</sup> In the remaining 20 Member States *without* regional parliaments with legislative powers, regional bodies are, as a rule, not involved in the formal procedures for subsidiarity monitoring, although some informal arrangements do exist.<sup>43</sup>

As the protocol does not regulate the arrangements for regional parliaments' involvement, the scope of such involvement as well as the institutional arrangements for it **vary considerably** among the relevant Member States. As mentioned, the protocol does not directly allocate votes to regional parliaments, but only to national parliaments and their chambers. In this regard a rather peculiar case is represented by Belgium, which in Declaration No 51 attached to the Treaties declared as follows:

'Belgium wishes to make clear that, in accordance with its constitutional law, not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliaments of the Communities and the Regions act, in terms of the competences exercised by the Union, as components of the national parliamentary system or chambers of the national Parliament.'

In essence, it means that the Belgian approach assimilates regional parliaments to national parliaments for the purposes of the protocol, provided a proposal falls within their competences.<sup>44</sup> A vote for early warning purposes can thus be cast – at the federal level – by the two chambers of the Belgian federal parliament and – at the regional/community level – by the Flemish Parliament, the Walloon Parliament, the Brussels-Capital Region Parliament, the Wallonia-Brussels Federation Parliament and the German-speaking community parliament.<sup>45</sup> If a matter falls within exclusive federal

<sup>40</sup> As confirmed by, for example, Prof. G. Abels in her speech on 'Regional Parliaments in Multi-Level Governance – Challenges and Perspectives in the Post-Lisbon Era', given in a conference on *Strengthening Regional Parliaments in EU Affairs: Challenges, Practices and Perspectives*, 2 July 2014, Committee of the Regions, Brussels.

<sup>41</sup> [CoR report](#) on the Subsidiarity Early Warning System of the Lisbon Treaty, November 2013.

<sup>42</sup> *Ibid.*, p. 112.

<sup>43</sup> *Ibid.*, p. 7.

<sup>44</sup> *Ibid.*, pp. 29, 100.

<sup>45</sup> *Ibid.*, pp. 27 et seq.; Kiiver, P. (2012), pp. 50 et seq; Delmartino, F. (2011), 'Die sieben Parlamente in Belgien auf dem Weg zur Teilhabe an der Europapolitik: Ein Modell für parlamentarische Kooperation?', in: Abels, G., Eppler, A., eds. (2011), *Auf dem Weg zum Mehrebenenparlamentarismus? Funktionen von Parlamenten im Politischen System der EU*. Schriftenreihe des Arbeitskreises Europäische Integration e.V. Band 75 (Nomos), pp. 261-278.

competence, it is the two chambers of the federal parliament which can activate the respective votes. In areas of a shared competence between the federal and the community/regional level, both votes can only be activated if each level casts (at least) one vote. In areas of exclusive community/regional competence, the competent level controls both votes which, however, must be cast by two assemblies belonging to different language regimes.<sup>46</sup>

The Belgian approach has led to some raised eyebrows as this unilateral definition of 'national parliament' may have important political and legal consequences,<sup>47</sup> and seems to go against the letter of the protocol, which makes an explicit distinction between national and regional parliaments. At the same time, however, as long as no Union-wide definition of national parliament exists it has been suggested that, given national constitutional autonomy, Member States should be allowed at least *some* leeway in defining the term, albeit within certain limits.<sup>48</sup>

The CoR study referred to above also points to the numerous **challenges** regional parliaments face in getting involved in subsidiarity monitoring. It is noted that regional parliaments will only invest resources in the laborious subsidiarity assessment if they anticipate their positions having a real impact. This **impact**, however, has been (perceived as) rather limited so far. This is due to many reasons, including the fact that national parliaments are not bound by regional parliaments' positions regarding subsidiarity. With the exception of the Belgian case addressed above, it is ultimately up to the national parliament whether or not to issue a reasoned opinion after having received the regional parliament's position. In Finland, however, arrangements exist which oblige the Finnish Parliament to at least 'consider' the position of the Åland Parliament.<sup>49</sup> Moreover, the subsidiarity positions of the regional parliaments are **not transmitted directly** to the EU institutions but are first collected at the national level which may choose not to forward such positions. In some countries, the positions of the regional parliaments are annexed to the national parliament's reasoned opinions, if there are any, while some regional parliaments simply choose to forward their position directly to the Commission. The 'national filter' for regional parliaments' positions regarding subsidiarity complicates the task of collecting **complete data** regarding the actual involvement of regional parliaments in the EWM. This, in turn, complicates the task of conducting empirical studies on such involvement (the IPEX platform<sup>50</sup> offers a platform for exchange for *national* parliaments).

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<sup>46</sup> Kiiver, P. (2012), pp. 50 et seq.

<sup>47</sup> This is because certain rights are also granted to national parliaments in other contexts, such as for example the right to object to a '*passerelle* clause' within the framework of the simplified treaty-revision procedure on the basis of Article 48(7) TEU, Kiiver, P. (2012), *The Early Warning System for the Principle of Subsidiarity. Constitutional Theory and Empirical Reality* (Routledge), p. 49.

<sup>48</sup> Kiiver, P. (2012), pp. 61-62. Also Van Nuffel, P. (2011), 'The Protection of Member States' Regions Through the Subsidiarity Principle', in: Panara, C (2011), *The Role of the Regions in EU Governance* (Springer), p. 75. Kiiver makes the point that 'national parliaments' cannot be an entirely national notion, allowing Member States to assign powers to internal constitutional bodies which contradict the letter of the Treaties, yet cautions against a rigid and inflexible definition, given the significant variations of national constitutional and institutional arrangements (pp. 24, 61).

<sup>49</sup> [CoR report](#) on the Subsidiarity Early Warning System of the Lisbon Treaty – the Role of Regional Parliaments with legislative Powers and Other Subnational Authorities, prepared by the Leuven centre for Global Governance Studies, November 2013, p. 101.

<sup>50</sup> The platform for EU interparliamentary exchange, [IPEX](#).

The Commission annual reports on subsidiarity and proportionality<sup>51</sup> are a valuable source of information regarding the number of reasoned opinions issued by *national parliaments and chambers thereof*, including the chambers representing regions (i.e. the German and Austrian *Bundesräte*). Generally, the data from 2009 to 2014 suggest that while the 'chambers of the regions' cannot be considered as 'hyperactive' in issuing reasoned opinions (especially when compared to, for example, the Swedish Parliament or the Dutch House of Representatives), their activity is nevertheless significant, at least compared to their national counterparts (the Austrian National Council and the German *Bundestag*).<sup>52</sup>

Further, the CoR study notes that regional parliaments often mention **lack of staff and resources** among the main factors inhibiting a genuine subsidiarity check. According to them, a non-superficial subsidiarity assessment requires specific training and is not necessarily helped by the diverging understandings among participants of what the subsidiarity principle actually entails. In this regard, the Committee of the Regions has been providing guidance in the form of, for example, a 'subsidiarity assessment grid',<sup>53</sup> which was considered a valuable tool by the regions. Lack of time and resources of regional parliaments becomes especially acute when one considers that the eight-week period granted to national parliaments by the protocol becomes shorter for regional parliaments, which need to submit their opinions well in advance (four to six weeks) to enable the national parliament to formulate its position before the expiry of the eight-week time limit.

It is also noted that sometimes a genuine subsidiarity check is hindered by the fact that regional representatives do not perceive any political/electoral benefit in concentrating on subsidiarity matters. This accounts partly for the relative **lack of interest** of regional representatives in subsidiarity matters. Sometimes, it is suggested, 'pro-European' assemblies simply 'do not wish to utilise every opportunity to object' to a draft legislative act using what is perceived as an EU-critical tool. This is consistent with the idea expressed in the literature, pointing to the fact that the role granted to national (and to a lesser extent to regional parliaments) within the EWM concerns the intention to challenge and *prevent* EU legislation rather than to *shape* it.<sup>54</sup>

The Early Warning Mechanism concerns *collective* action by parliaments and requires regional parliaments to engage in **networking** activities to coordinate their subsidiarity positions with other regional parliaments, both within and outside the Member State. In this regard, a number of formalised cooperation arrangements exist, although of varying intensity. Some note that intra-state cooperation is easier in countries with a long tradition of such cooperation (e.g. Germany) but potentially more difficult in countries with deeper cultural/ethnic cleavages.<sup>55</sup> In order to facilitate coordination and exchange of information among regional bodies, the Committee of the Regions

<sup>51</sup> Full list available at: [European Commission – Annual reports on better law-making](#).

<sup>52</sup> This is based on calculation by Panara, C. (2015), *The Sub-national Dimension of the EU. A legal Study of Multilevel Governance* (Springer), p. 115.

<sup>53</sup> Committee of the Regions, [subsidiarity assessment grid](#).

<sup>54</sup> Sprungk, C. (2013), '[A New Type of Representative Democracy? Reconsidering the Role of National Parliaments in the European Union](#)', *Journal of European integration*, 35(5), pp. 547-563.

<sup>55</sup> This is noted by, for example, Prof. G. Abels in her speech on 'Regional Parliaments in Multi-Level Governance – Challenges and Perspectives in the Post-Lisbon Era', given at a conference on *Strengthening Regional Parliaments in EU Affairs: Challenges, Practices and Perspectives*, 2 July 2014, Committee of the Regions, Brussels.

created a [REGPEX platform](#) as part of its [Subsidiarity Monitoring Network](#), with the aim of supporting regions in subsidiarity monitoring and facilitating exchange. The platform allows regional parliaments to share their positions regarding subsidiarity, which may also inspire the Committee's opinions on draft proposals. The CoR study further noted that effective cross-regional cooperation is further complicated by the issue of different languages. To alleviate this, the CoR has developed a standard form,<sup>56</sup> enabling the parliaments to submit a summary of their subsidiarity analysis in English.

Overall, the CoR study concludes, inter alia, that regional parliaments have responded to the new developments in subsidiarity monitoring, although their initial enthusiasm has decreased somewhat given the rather high costs (in terms of time and resources) of genuine subsidiarity monitoring and slight corresponding benefits (low impact of their positions, little political/electoral benefit or sheer unwillingness to block EU legislation). According to the study, this has led to a certain subsidiarity fatigue, which is not least due to the low visibility of regional parliaments in the EWM. It is, however, also added that the actual impact of regional parliaments in the EWM varies considerably across states and has potential for improvement. According to the study, such improvement could be achieved by, inter alia, increasing the visibility of regional parliaments (e.g. through direct communication channels with the EU institutions) and intensifying training and guidance provided by the Committee of the Regions.<sup>57</sup>

Besides the (practical) challenges faced by regional parliaments summarised above, scholarly literature more generally expresses diverging views regarding both the **feasibility** and **desirability** of increased regional participation in subsidiarity monitoring. For example, in a book on regional participation published against the background of the negotiations on the (then) Constitutional Treaty, Stephen Weatherill vehemently argued for a strengthened role for the sub-national actors, which should at least be aligned with that of the national parliaments and the Committee of the Regions.<sup>58</sup> According to the author, this should include, inter alia, the right to submit a reasoned opinion directly which would count as a vote towards a yellow/orange card. While, as Weatherill agrees, some 'complicated arithmetic' may be needed in order to allocate the votes, according to him, this is a price worth paying to enhance legitimacy by means of regional involvement and promote a 'vibrant culture of multi-level governance'.<sup>59</sup>

It remains unclear how this complex arithmetic could look, given the recognition that direct allocation of votes to regional parliaments may ultimately benefit states having regions with legislative powers compared to those not having them. This would mean that federal states such as, for example, Germany, could be better off under the system than unitary states such as, for example, France. The risk of **inequality** between states looms large and, in the extreme, a small number of states with legislative regions could come to control a lion's share of votes.

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<sup>56</sup> [REGPEX portal – Committee of the Regions](#).

<sup>57</sup> Best practices and policy recommendations and best practices are formulated in the [CoR report](#), pp. 115 et seq.

<sup>58</sup> Weatherill, S. (2005), 'Finding a Role for the Regions in Checking the EU's Competence', in: Weatherill, S. and Bernitz, U. (eds.), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing), p. 153.

<sup>59</sup> *Ibid.*, pp. 153-155.

Some question, more generally, the feasibility and desirability of a system granting explicit recognition of sub-national parliaments in early warning. They refer to the above-mentioned lack of resources of regional parliaments, the sheer lack of incentives to engage in careful subsidiarity checks and the limits of inter-parliamentary cooperation, concluding that the potential of such regional involvement to enhance democratic legitimacy is limited.<sup>60</sup> Also Weatherill agrees that taking (full) account of constitutional variation at national level carries the potential of adding extra delay and opacity, and may compromise the EU's ability to act.<sup>61</sup>

It should be noted that some of the issues addressed above (lack of resources, tight deadlines or lack of incentives) apply with regard to subsidiarity monitoring in general, whether conducted by national or regional parliaments. Some scholars point to, inter alia, high thresholds for yellow/orange cards<sup>62</sup> and the resultant rare use of the card procedures in practice.<sup>63</sup> Some have expressed regrets regarding the fact that the EWM only extends to subsidiarity and not to proportionality, despite the fact that the two principles are difficult to disaggregate in practice.<sup>64</sup> These views are challenged by the suggestion that the number of blocked proposals cannot (and should not) be a benchmark against which the success of the EWM should be judged, holding that the EWM is not primarily about vetoing but about *justifying* legislation.<sup>65</sup>

Finally, the political control of compliance with subsidiarity is complemented by the possibility for judicial review, which may lead to an annulment of an act if it does not pass the subsidiarity test. This gives 'legal teeth' to subsidiarity monitoring, to which the following sections now turn.

## 4. Committee of the Regions: subsidiarity and action for annulment

The Committee of the Regions (CoR) was created in 1994 following the Maastricht Treaty, but its origins go back to the Consultative Council of Regional and Local Authorities, established in 1988 with the aim of involving sub-national authorities in the Community's regional policies. It is a body consisting of 350 'representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly'.<sup>66</sup> Although not formally an EU

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<sup>60</sup> Patzelt, W., as referred to by Prof. G. Abels, '[Regional Parliaments in Multi-Level Governance – Challenges and Perspectives in the Post-Lisbon Era](#)', given at a conference on *Strengthening Regional Parliaments in EU Affairs: Challenges, Practices and Perspectives*, 2 July 2014, Committee of the Regions, Brussels.

<sup>61</sup> Weatherill, S. (2005), 'The Challenge of the Regional Dimension in the European Union', in: Weatherill, S. and Bernitz, U. (eds.), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing), pp. 29-30.

<sup>62</sup> Sprungk, C. (2013), 'A New Type of Representative Democracy? Reconsidering the Role of National Parliaments in the European Union', in: *Journal of European Integration*, 35(5), p. 547-563.

<sup>63</sup> Just two yellow card procedures have been triggered so far: Pintz, A. (2014), '[National Parliaments Overcoming Collective Action Problems Inherent in the Early Warning Mechanism: The Cases of Monti II and EPPO](#)', Working Paper Series, School of Government Luiss Guido Carli.

<sup>64</sup> Weatherill, S. (2005), 'Better Competence Monitoring', *European Law Review*, 30, p. 23-41.

<sup>65</sup> Kiiver, P. (2012), *The Early Warning System for the Principle of Subsidiarity. Constitutional Theory and Empirical Reality* (Routledge), p. 148.

<sup>66</sup> Article 300(3) TFEU.

institution, the Committee – along with the Economic and Social Committee – is recognised as an **advisory body**<sup>67</sup> which is to be consulted in the legislative process whenever the Treaties so provide. Such consultation of the Committee is mandatory in numerous areas, including economic, social and territorial cohesion, employment, social affairs, education, youth and culture, public health, transport, sport, environment, energy and climate change. Consultation of the Committee where the Treaties so provide is an essential procedural requirement which, if omitted, may lead to annulment of an EU act under Article 263 TFEU. Although the Treaties establish a **duty to consult** but not a duty to follow the Committee's opinions, the Commission nevertheless reports to the Committee how its opinions have been taken into account.<sup>68</sup> Consultation of the Committee is not limited to areas in which such consultation is mandatory but can also be undertaken in other areas if the institutions consider it appropriate (optional consultation). The Committee can also submit opinions on its **own initiative** (Article 307 TFEU), which makes the advisory activity of the Committee potentially very broad. The areas of mandatory consultation have been expanded throughout the years, most recently in the Lisbon Treaty (to include energy, civil protection, climate change, and services of general interest). Importantly, the Treaty of Lisbon granted the Committee the right to challenge the legality of Union acts in an **action for annulment** before the Court of Justice in order to protect its **own prerogatives**. No such corresponding right was granted to the Economic and Social Committee.<sup>69</sup> In addition, in line with the subsidiarity protocol discussed above, the Committee can now also bring actions on subsidiarity grounds against legislative acts, for the adoption of which the Committee has to be consulted (Article 8). The right to bring action before the CJEU gives legal force to the otherwise rather feeble subsidiarity monitoring, and complements the Early Warning Mechanism discussed above. In terms of regional participation, this new right of the Committee has been referred to by some as the most promising change of the Lisbon Treaty.<sup>70</sup>

#### 4.1. Action for annulment on subsidiarity grounds: conditions

While the above-mentioned Early Warning Mechanism concerns, as the title suggests, a subsidiarity check *before* the adoption of an act (*ex ante*), an action for annulment concerns a challenge to an adopted act (*ex post*). Such action is governed by Article 263 TFEU, which sets out a number of conditions. With regard to the Committee's role in such an action on subsidiarity grounds, Article 8 of the subsidiarity protocol provides as follows: 'in accordance with the rules laid down in the said Article [Article 263 TFEU], the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.' Therefore, in essence three conditions need to be fulfilled for an action by the Committee to be admissible:

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<sup>67</sup> Article 13(4) TEU and Article 300 TFEU.

<sup>68</sup> This is stipulated in the [Protocol on the Cooperation between the European Commission and the Committee of the Regions](#), para 14.

<sup>69</sup> Some explain this with the 'democratic legitimacy' argument as, contrary to the Economic and Social Committee, the CoR consists of representatives who hold an *elected mandate or are politically accountable for an electoral assembly*, Article 300(3) TFEU, Schwarze, J., ed. (2012), *EU-Kommentar* (Nomos), p. 2387.

<sup>70</sup> Högenauer, A. (2008), 'The Impact of the Lisbon Reform Treaty on Regional Engagement in EU Policy Making - Continuity or Change?', in: *European Journal of Law Reform*, 10(4), p. 551.

- First, the act challenged must be a **legislative act**. A legislative act is an act which was *adopted following a legislative procedure*, ordinary or special.<sup>71</sup> Non-legislative acts, including delegated and implementing acts, are excluded from the scope of the protocol and thereby from action by the Committee;
- Second, the act challenged must be an act for which consultation of the Committee is **mandatory** according to the Treaties;
- Third, the act must be challenged within **two months** of its publication.

It should also be added that while Protocol No 2 concerns both subsidiarity and proportionality, an action under Article 8 of the protocol may only concern subsidiarity. If such an action is successful, the act will be declared void.<sup>72</sup>

#### Standing before the Court

In order to bring an action for annulment under Article 263 TFEU, parties have to be entitled to do so (*locus standi*). Article 263 TFEU makes a distinction between what is called (fully) privileged, semi-privileged and non-privileged applicants. **Fully privileged** applicants include the Member States, the European Parliament, Council and the Commission. They have automatic standing to challenge the legality of Union acts, without having to satisfy any further conditions (the time limit of two months set out in Article 263 TFEU still applies, as well as the condition that the respective act needs to be a challengeable act). **Semi-privileged** applicants, which include the Committee of the Regions, the Court of Auditors and the European Central Bank, may bring actions 'for the purpose of protecting their own prerogatives'. In essence, this means that they can start an action for annulment whenever their institutional participation rights (e.g. those regarding their consultation or information) are affected. The situation of **non-privileged** applicants, which include natural and legal persons, is the most complex. Such applicants may bring an action against: (1) acts *addressed* to them, (2) acts which are of *direct and individual* concern to them, and against (3) *regulatory acts* which are of direct concern to them and do not entail implementing measures. The term 'regulatory act' has been defined by the Court to include non-legislative acts of general application.<sup>73</sup> These requirements, in particular the requirement of 'individual' concern, gave rise to a complex body of case law of the Court of Justice and are, generally, difficult to satisfy in practice. Sub-national authorities fall within the category of non-privileged applicants for the purposes of Article 263 TFEU procedure. In some Member States, internal arrangements exist allowing (groups of) regional authorities to request the central government to bring an action. In such cases, the central government is either obliged to do so (e.g. Belgium) or may depart from such a request.

## 4.2. Committee of the Regions' approach

According to Rule 13(g) of the Committee's Rules of Procedure, the decision to bring an action before the Court is taken by the Plenary Assembly by simple majority, with a majority of members present.<sup>74</sup> This decision can be taken on the proposal of the President or the commission responsible for drawing up the draft opinion. The commission, which takes the decision by simple majority, needs to provide a 'detailed report', giving reasons for its proposal to start an action before the Court. When the decision to start an action is adopted by the Plenary Assembly, the action will be

<sup>71</sup> Article 289(3) TFEU.

<sup>72</sup> Article 264 TFEU. Where appropriate, the annulment of an act may concern only parts of it, Case C-244/03, *French Republic v European Parliament and Council*. [2005] ECR I-4021.

<sup>73</sup> Case T-18/10 *Inuit Tapiriit Kanatami v European Parliament and Council* (Inuit I), [2011] ECR II-5599.

<sup>74</sup> In cases of urgency, Article 37(j) of the Rules of Procedure apply, providing for the right of the Bureau to take a decision to bring an action.

brought by the President of the Committee. It was noted that the current requirement for a simple majority represents a compromise between the demands of delegations calling for high thresholds (e.g. two thirds) to bring an action and delegations from (primarily) federal states, which demanded (much) lower thresholds to bring an action.<sup>75</sup>

So far, the Committee of the Regions has not launched any action on subsidiarity grounds. In its 2005 opinion concerning subsidiarity and proportionality, adopted against the background of the (then already rejected) Constitutional Treaty, the Committee welcomed its enhanced rights concerning its standing before the Court (provided for in a protocol attached to the treaty), yet also indicated that it was 'determined to use the right to bring actions before the Court of Justice as a **last resort** and only when all other means of exerting influence have been exhausted.'<sup>76</sup> The Committee currently expresses its confidence that the possibility of taking legal action will enhance its consultation rights earlier in the legislative process and that 'it will not have to resort to action in the European courts.'<sup>77</sup>

With regard to the Committee's right to start legal action to protect its own prerogatives, a parallel has been drawn with the corresponding rights of the European Parliament within the same procedure. Throughout the European integration process, the European Parliament – along with its growing role as (co-)legislator in the EU – also gradually improved its status within the Article 263 TFEU procedure, from a 'non-privileged' to 'semi-privileged' to 'fully privileged' applicant. While the Maastricht Treaty added the Parliament to the list of semi-privileged applicants, able to challenge Union acts to defend their prerogatives,<sup>78</sup> the Nice Treaty lifted this condition, thereby moving the Parliament into the category of fully privileged applicants.

It is therefore not surprising that a comparison was made with the recent developments regarding the Committee, which was absent in the wording of the previous versions of Article 263 TFEU yet has become a semi-privileged applicant with the Lisbon Treaty. It remains open as to whether, and how far, the Committee can exploit this potential in the same or similar way. It is too early to comment on the Committee's potential to secure rights similar to those of the European Parliament, especially given that the Parliament's journey to the category of privileged applicants took several decades. In the literature, however, an argument was made that it might be slightly more difficult for the CoR than for the EP to acquire similar rights, given the rather different nature of these bodies. It was suggested that while the Parliament is the central place of representative democracy, upon which the systems of *all* Member States are based, the Committee, on the other hand, has the 'disadvantage of demanding more powers when the powers that regions hold domestically vary substantially between Member States.'<sup>79</sup>

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<sup>75</sup> Schwarze, J., ed. (2012), *EU Kommentar* (Nomos), p. 2424.

<sup>76</sup> Opinion of the Committee of the Regions on Guidelines for the application and monitoring of the subsidiarity and proportionality principles, 2006/C 115/08, 3.22.

<sup>77</sup> Committee of the Regions, [A new treaty: a new role for regions and local authorities](#), p. 7.

<sup>78</sup> This was the incorporation of the 'Chernobyl' judgment: Case C-70/88 *European Parliament v Council* [1990] ECR I-2041.

<sup>79</sup> Högenauer, A. (2008), 'The Impact of the Lisbon Reform Treaty on Regional Engagement in EU Policy Making - Continuity or Change?', in: *European Journal of Law Reform*, 10(4), p. 551, fn 72.

Although there have not been actions for annulment initiated by the Committee of the Regions, it is generally agreed that the very prospect of legal action ex post may at least force a **greater weight** for the Committee's opinions ex ante and enhance the Committee's participation rights early in the legislative process.<sup>80</sup> According to the Committee's Rules of Procedure (Rule 55(2)), Committee opinions on legislative acts have to incorporate an explicit statement regarding the proposal's compliance with the principles of subsidiarity and proportionality.

Some note that there seems to be little faith on the side of the Committee that the subsidiarity principle can (or should) be enforced by means of judicial review.<sup>81</sup> Already in the 2005 opinion referred to above, the Committee had noted the 'very restrictive' approach of the CJEU in reviewing compliance with subsidiarity, and questioned whether the Court will be willing to 'step up its checks'.<sup>82</sup> The intensity of judicial review of the subsidiarity principle has indeed preoccupied legal scholars investigating subsidiarity, who have pointed to the 'light touch' approach of the court to subsidiarity matters, yet also questioned the feasibility (as well as desirability) of more intensive judicial scrutiny.

### 4.3. Challenges on subsidiarity grounds: intensity of judicial review

Generally, the number of challenges on subsidiarity grounds is **low**. If such claims are brought, subsidiarity is normally not the main, let alone the only, plea.<sup>83</sup> Craig and De Búrca suggested in 2011 that in nearly 20 years since the introduction of the principle in the Maastricht Treaty, there have been just over ten real challenges on grounds of subsidiarity, which means roughly one challenge every two years.<sup>84</sup> With regard to this line of case law, it was often claimed that the Court has adopted a 'light touch' approach to subsidiarity,<sup>85</sup> and it has never struck down a measure due to breach of the principle.

Scholars have also pointed to the **difficulties** of judicial review when it comes to subsidiarity, which in essence concerns the appropriate level of action in a given case and may draw the Court into areas of intense political controversy.<sup>86</sup> Craig and De Búrca, for example argued that:

'if ECJ continues with very light touch review, it will be open to the criticism that it is effectively denuding the obligation in Article 5(3)-(4) of all content. If, by way of contrast, the ECJ takes a detailed look at the evidence underlying the Commission's

<sup>80</sup> Högenauer, A. (2008), 'The Impact of the Lisbon Reform Treaty on Regional Engagement in EU Policy Making - Continuity or Change?', in: *European Journal of Law Reform*, 10(4), p. 551; Panara, C. (2015), *The Sub-national Dimension of the EU. A legal Study of Multilevel Governance* (Springer). This view is also reflected by the Committee of the Regions itself, [A new treaty: a new role for regions and local authorities](#), p. 7.

<sup>81</sup> Panara, C. (2015), *The Sub-national Dimension of the EU. A legal Study of Multilevel Governance* (Springer), p. 121.

<sup>82</sup> Opinion of the Committee of the Regions on Guidelines for the application and monitoring of the subsidiarity and proportionality principles, 2006/C 115/08, 3.18.

<sup>83</sup> Panara, C. (2015), *The Sub-national Dimension of the EU. A legal Study of Multilevel Governance* (Springer), p. 82.

<sup>84</sup> Craig, P. and De Búrca, G. (2011), *EU Law. Text, Cases and Materials* (Oxford University Press), p. 99.

<sup>85</sup> *Ibid.*, p. 98, referring to, in particular, *Working Time Directive* (Case C-84/94 *United Kingdom v Council*) and *Vodafone* (C-58/08 *Vodafone*) cases; also Weatherill, S. (2005), p. 138.

<sup>86</sup> Weatherill, S. (2005), p. 139.

claim it will have to adjudicate on what may be a complex socio-economic calculus concerning the most effective level of government for different regulatory tasks.<sup>87</sup>

Scholars have been exploring the options for a workable model of judicial review of subsidiarity, noting, for example, that judicial review of subsidiarity may be facilitated at least to some extent by a stricter interpretation of the duty to give reasons and increased attention to the Commission's preparatory documents.<sup>88</sup> Even so, it is concluded that the application of the principle remains controversial, and it is likely to remain so in the foreseeable future.<sup>89</sup>

Above, with regard to early warning and the generally low number of yellow card procedures, the argument was made that the number of such procedures is not necessarily a benchmark against which the success of the EWM should be judged. A parallel argument can be made with regard to judicial review: the very prospect of an action for annulment *ex post* induces serious consideration of subsidiarity concerns *ex ante*. For example, the Better Regulation Toolbox, which complements Better Regulation Guidelines, gives careful guidance to Commission officials regarding the subsidiarity principle and states:

'national Parliaments and the *Committee of the Regions* have rights and powers to monitor the application of the principle of subsidiarity and they will *critically examine any related analysis* provided by the Commission.'<sup>90</sup>

## 5. The sub-national dimension of Better Regulation

The above sections addressed the ways of regional participation as envisaged by the EU Treaties. Some of the issues raised above, especially those regarding subsidiarity, are also echoed in the Commission's Better Regulation package presented in May 2015.<sup>91</sup> The package signals renewed commitment to subsidiarity, proportionality, effectiveness, transparency and stakeholder participation, and places new emphasis on the question of how Union policies are being **implemented and applied**. With regard to implementation, the package contains some novelties which were considered as having potential to improve the functioning of multi-level governance in the EU.<sup>92</sup> Increased emphasis on **subsidiarity** and its sub-national dimension was already signalled by the (then) candidate for Commission President, Jean Claude Juncker, who in 2014 declared he attached great value to the subsidiarity principle.<sup>93</sup>

Regional, local and subsidiarity concerns are to be incorporated in the preparation of an initiative from its very inception. As noted above, in line with Article 11(3) TEU, Article 2 of the subsidiarity protocol (No 2) obliges the Commission to **consult widely** before proposing legislative acts and, where appropriate, to take into account the regional and local dimension of the envisaged action in such consultations (Article 2).

<sup>87</sup> Craig, P. and De Búrca, G. (2011), p. 99.

<sup>88</sup> *Ibid.*, p. 99.

<sup>89</sup> Craig P. (2012), p. 84.

<sup>90</sup> [Better Regulation Toolbox](#), tool #3, p. 24. (Emphasis added.)

<sup>91</sup> European Commission, [Better Regulation package](#), 19 May 2016.

<sup>92</sup> This was suggested with regard to so-called 'implementation plans' and the REFIT platform, Renda, A. *Too good to be true? A quick assessment of the European Commission's new Better Regulation Package*, CEPS special report No. 108, May 2015, p. 9 and 11.

<sup>93</sup> [Speech](#) by Jean Claude Juncker, delivered on 25 April 2014 in Poznan.

Article 5 further obliges the Commission to make a detailed statement allowing appraisal of the proposal's compliance with the principles of subsidiarity and proportionality. This statement should be supported by qualitative and, wherever possible, quantitative, indicators. In the case of a directive, the statement should contain an assessment of rules to be put in place by Member States including, where necessary, regional legislation.

The Commission's approach to stakeholder consultation is set out in the Better Regulation Guidelines, which explicitly stress the need to target, in consultations, *inter alia*, public authorities ultimately entrusted with application and enforcement tasks in order to incorporate the relevant implementation expertise into the planned initiative.<sup>94</sup> In other words, those at the 'frontlines' of policy implementation are to be explicitly targeted in consultations. In addition, the 2012 Cooperation Protocol concluded between the European Commission and the Committee of the Regions<sup>95</sup> recognises the 'privileged' role of the Committee of the Regions and provides for close cooperation between the two bodies in implementing Article 2 of the subsidiarity protocol. Echoing this commitment, the Better Regulation Toolbox provides that Commission departments may seek *assistance* of the Committee of the Regions' platforms and networks in public consultations, whenever an initiative is likely to have significant regional impacts.<sup>96</sup> It should be noted that public consultations will also take place with regard to *evaluation* of Union law already adopted, which may equally serve as an opportunity for those entrusted with implementation or enforcement tasks to draw attention to issues regarding such implementation.

The above-mentioned Cooperation Protocol further envisages collaborative efforts by the two bodies to create a 'culture of subsidiarity' and cooperation in preparing **Impact Assessments**. Such cooperation may also entail resorting to the Committee's networks in order to incorporate regional and local aspects in an impact assessment.<sup>97</sup> Addressing subsidiarity concerns is among the explicit steps to be incorporated in impact assessments and the respective guidance signals that subsidiarity considerations are not to be taken lightly. Commission Guidelines on Impact Assessment explicitly state that:

'The IA should verify whether EU action in areas outside its exclusive competence is compatible with the principle of subsidiarity. This is *not to be taken for granted* and it is important to remember that, pursuant to the Treaty of Lisbon, the respect of the principle of subsidiarity is *closely scrutinised* by the other EU institutions and by national parliaments and that Union acts can be *annulled* by the Court for non-respect of the principle.'<sup>98</sup>

All Commission proposals are to be accompanied by an **explanatory memorandum**, explaining the context of and the reasons for a proposal.<sup>99</sup> The Commission Better Regulation Communication expresses the Commission's aspiration to *explain better* the action it takes by means of improved explanatory memorandums, which are to

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<sup>94</sup> [Better Regulation Guidelines](#), pp. 34 and 74.

<sup>95</sup> [Protocol on the Cooperation between the European Commission and the Committee of the Regions](#) (par. 22).

<sup>96</sup> [Better Regulation Toolbox](#), tool #50, par. 5.12.

<sup>97</sup> *Ibid.*, par. 23.

<sup>98</sup> [Better Regulation Guidelines](#), p. 21. (Emphasis added.)

<sup>99</sup> [Better Regulation Toolbox](#), tool #34.

incorporate subsidiarity considerations too.<sup>100</sup> This commitment is fleshed out by the Better Regulation Toolbox, which – in line with the above-mentioned provisions of the subsidiarity protocol – gives greater detail regarding the content and the form of an explanatory memorandum. This guidance explicitly states that 'standard phrases' merely stating that a proposal complies with the principle are insufficient, and formulates explicit questions to be answered in order to demonstrate the proposal's compliance with the principle. It thereby responds to criticism expressed by some scholars with regard to the Commission's minimalist approach to subsidiarity in its earlier explanatory documents.<sup>101</sup>

Once a proposal is made and sent to the Union legislature and national parliaments, the Committee of the Regions will cooperate with national and regional parliaments regarding the subsidiarity check and later issue an **opinion** on the draft legislative act. As discussed above, consultation of the Committee can be mandatory according to the Treaties, or institutions may choose to consult the Committee if they consider it appropriate (optional consultation).<sup>102</sup>

As noted, the 2015 Better Regulation package places new emphasis on the issue of how Union legislation is being **implemented and applied** in practice. This is relevant for sub-national actors given that the bulk of EU laws will be implemented and applied by regional or local authorities, and that Union law may have to be implemented by regional parliaments with legislative powers. For example, in order to improve the implementation of Union policies, the package envisages drafting **implementation plans**, aimed at supporting Member States or their regional/local authorities in their transposition and implementation work. Such plans are intended to identify 'implementation needs and actions required of different entities to ensure a timely, effective and consistent implementation.'<sup>103</sup> Another novelty of the Better Regulation package is the **REFIT platform**,<sup>104</sup> chaired by the First Vice-President, Frans Timmermans, to bring forward suggestions on reducing regulatory burdens 'arising from Union legislation and its implementation in Member States'. It is composed of two groups: the '**government group**' of 28 members appointed by each Member State from its public administration and a '**stakeholder group**' consisting of 20 experts from the Economic and Social Committee, CoR, businesses, social partners and civil society organisations. The platform, although primarily concerned with burden reduction, has been seen as potentially a powerful channel of communication for stakeholders with

#### Cooperation Agreement with the European Parliament

The Committee of the Regions has concluded a [cooperation agreement](#) with the European Parliament (2014). This agreement provides for cooperation between the two bodies regarding, inter alia, impact assessments, which may include systematic provision of information to the Parliament from the national, regional and local levels regarding how legislation and programmes are working in practice. In certain 'priority subjects', intensified cooperation can be established with the parliamentary committee concerned.

<sup>100</sup> COM(2015) 215 final, p. 5.

<sup>101</sup> Expressed in, for example, Van Nuffel, P. (2011), 'The Protection of Member States' regions through the Subsidiarity Principle', in: Panara, C (2011), *The Role of the Regions in EU Governance* (Springer), p. 68-69.

<sup>102</sup> The cooperation protocol also formulates criteria under which such optional consultation will be envisaged, par. 9.

<sup>103</sup> [Better Regulation Guidelines](#), Glossary, p. 90.

<sup>104</sup> Established by Commission Decision establishing the REFIT platform [C\(2015\) 3261 final](#) and the corresponding Communication on its structure and functioning, [C\(2015\) 3260 final](#).

the First Vice-President.<sup>105</sup> Renda suggested that the platform may further 'serve as a forum for reflection on the functioning of the EU's multilevel governance, in particular when problems highlighted by the platform members will relate to the transposition and implementation of specific pieces of legislation.'<sup>106</sup>

## 6. Outlook

The need for greater involvement of regional and local actors in EU affairs has long been recognised. At the same time, calls for such recognition have often been accompanied by concerns regarding, inter alia, efficiency, the Union's capacity to act and equality between Member States. At the core of this debate was the aspiration to strike a delicate balance between allowing sub-national actors a greater say in EU decision-making to foster democratic legitimacy, while at the same time avoiding delays in the already laborious decision-making processes, preventing even greater complexity of EU institutional architecture and ensuring equality of Member States irrespective of their internal constitutional arrangements.

In any case, the role of sub-national bodies in EU decision-making has undoubtedly grown. The EU Treaties open the doors for regional participation in several ways. Among the first and significant changes, which was considered promising in terms of regional participation, was providing for the **access of regional ministers to the Council**. While the traditional approach regarding the composition of the Council was that it consisted of representatives of the central government, the Maastricht Treaty dropped the reference to Member States' governments, thereby enabling 'representatives at ministerial level' – including regional ministers – to represent their countries in the Council. The Treaties thereby open the doors for regional involvement in the Council, yet leave it to the national level to determine the possibility and the extent of such involvement as well as its modalities (states as 'gate-keepers'). As a result, different practices emerged across several Member States and the intensity of regional involvement in this respect varies significantly. In fact, only a handful of states – primarily federal or quasi-federal – made use of this provision and the effect of this provision in terms of regional participation are considered significant but limited.

Important changes in terms of regional participation, primarily in terms of **subsidiarity**, were brought by the Treaty of Lisbon. The treaty for the first time recognised the **sub-national dimension** of the subsidiarity principle, by *explicitly* opening up the possibility that some action can best be taken not only at the national but possibly at regional or local level (Article 5(3) TEU). Accordingly, sub-national dimension was incorporated in provisions dealing with **monitoring compliance** with the principle, including the Protocol No 2 on the application of the principles of subsidiarity and proportionality.

The protocol establishes the so-called **Early Warning Mechanism (EWM)** and is primarily concerned with enhancing the role of national parliaments. However, regional parliaments are another separate category of bodies envisaged by the protocol. Currently, there are 75 regional parliaments with legislative powers spread over eight Member States. In the EWM monitoring process, it is up to the national parliaments, after receiving a draft legislative proposal, to consult regional parliaments with

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<sup>105</sup> A. Renda, *Too good to be true? A quick assessment of the European Commission's new Better Regulation Package*, CEPS special report No. 108, May 2015, p. 11.

<sup>106</sup> *Ibid.*, pp. 9 and 11.

legislative powers. The limits of regional participation in this respect are already evident in the wording of this provision: unlike national parliaments, regional parliaments are not directly allocated votes for the purpose of triggering a yellow/orange card procedure: it remains up to the national parliaments whether or not to consult their regional counterparts. The opinions of the latter are not binding upon national parliaments (with the exception of Belgium) and the role of regional parliaments thus remains **advisory**. Further challenges for regional parliaments, reported in post-Lisbon Treaty studies on regional parliaments, include lack of **staff and resources** to engage in genuine subsidiarity assessment, lack of direct communication channels with EU institutions, sometimes different understandings of the subsidiarity principle, or the sheer lack of incentives to engage in subsidiarity monitoring. As a result, the emerging practices are varied and regional engagement remains **uneven**. Interestingly, it is also mentioned that, regional parliaments sometimes simply do not wish to engage in what is perceived as an EU-critical tool for the purpose of, potentially, blocking – instead of *shaping* – EU legislation. It is for these and other reasons that the potential of regional parliaments to contribute to meaningful subsidiarity monitoring is disputed in scholarly literature. The system has now been in place for six years, and it remains to be seen how it will further develop in practice.

The political control of compliance with the principle of subsidiarity within the EWM would remain feeble if it was not backed by the possibility of **judicial review** of the principle. An action for annulment before the Court of Justice on subsidiarity grounds *ex post* constitutes an important adjunct to subsidiarity monitoring *ex ante*. Importantly, the Treaty of Lisbon added the **Committee of the Regions** to the list of semi-privileged applicants, able to start an action for annulment to protect its own prerogatives. In addition, the Committee has been given an explicit right to start an action for annulment on subsidiarity grounds for legislative acts, for the adoption of which the Treaties provide for mandatory consultation of the Committee. Therefore, the Committee has become a 'guardian' of the principle of subsidiarity and, given its composition, of its sub-national dimension in particular. While the Committee has not yet made use of this power, it is generally agreed that the very prospect of an action may enhance the Committee's participation rights early in the process and enable the Committee to effectively shape EU legislation. It should also be noted in this regard that the Committee has established many formal and informal channels of communication with the main legislating institutions, providing for early involvement of the Committee in the legislative process. Such involvement is provided for, for example, in the **cooperation agreements** concluded by the Committee and the Commission and Parliament respectively. Moreover, the current Better Regulation agenda focuses increased attention on subsidiarity concerns when preparing proposals and contains numerous references to the regional and local dimension of Union policies, especially with regard to their implementation.

It is not necessarily the number of reasoned opinions, yellow cards or (successful) actions for annulment, on the basis of which subsidiarity monitoring (or regional involvement in it) should be judged. To borrow a phrase of Weatherill, subsidiarity is 'an invitation to think hard about choosing the best level of governance in Europe'.<sup>107</sup> Following this line of reasoning, it may well be argued that the very prospect of action

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<sup>107</sup> Weatherill, S. (2005), 'Finding a Role for the Regions in Checking the EU's Competence', in: Weatherill, S. and Bernitz, U. (eds.), *The Role of Regions and Sub-National Actors in Europe* (Hart Publishing), p. 136.

for annulment and the very fact of scrutiny by various actors at different levels forces the institutions to pay greater attention to subsidiarity concerns ex ante, and to justify more carefully whether an issue needs to be addressed at the European, national, regional, or even local level. As has been argued in a different context,<sup>108</sup> the very existence of a 'big stick' in the background makes it less likely that there will be a need to resort to it in practice.

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<sup>108</sup> Braithwaite, J. (1993), 'Responsive Business Regulatory Institutions', in: Coady, C. and Sampford, C. (eds), *Business, Ethics and the Law* (Federation Press), p. 88.

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The role of sub-national bodies in EU decision-making has grown. In this regard, significant changes were introduced by the Treaty of Lisbon, which inserted an explicit reference to the sub-national dimension of the subsidiarity principle, and granted the Committee of the Regions the right to bring an action for annulment. While the 'Early Warning Mechanism' for subsidiarity monitoring is primarily concerned with national parliaments, regional parliaments with legislative powers form a separate category of bodies caught by the protocol and may play an advisory role. Existing research, however, points to problems and challenges which regional parliaments face in engaging in genuine subsidiarity monitoring.

Ex-ante subsidiarity monitoring is complemented by the possibility of ex post judicial review. Generally, challenges to Union acts on subsidiarity grounds are infrequent. At the same time, it is agreed that the very possibility of judicial review forces greater weight to be given to subsidiarity concerns during the preparation of Union law and encourages EU institutions to consider carefully whether an issue is best addressed at the European, national, regional or local level.

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